No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, *et al.*,

Petitioners,

v.

SYLVIA MATTHEWS BURWELL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PACIFIC RESEARCH INSTITUTE, INDIVIDUAL RIGHTS FOUNDATION, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....6

I. The Fourth Circuit Failed To Fulfill Its Article III Responsibility To Enforce The Text Of The Affordable Care Act As Written.....6

II. Neither The IRS Nor The Courts Have The Authority To Usurp Congress's Lawmaking Power By Making Tax Credits Available To Purchasers On Federal Exchanges.....13

III. Fundamental Separation Of Powers Principles Require The Court To Return The Issue Of Tax Credit Availability On Federal Exchanges To The Political Process.....19

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

CASES

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 7

Air Power, Inc. v. United States,
741 F.2d 53 (4th Cir. 1984) 16

Aldridge v. Williams,
44 U.S. 9 (1845) 9

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 25

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 23

Bank One Chicago, N.A. v. Midwest Bank & Trust Co.,
516 U.S. 264 (1996) 9

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 12, 25

Bate Refrigerating Co. v. Sulzberger,
157 U.S. 1 (1895) 9

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541 U.S. 176 (2004) 7

Cited Authorities

Page

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124 S. Ct. 881 (2014) 22

Chevron U.S.A. Inc. v. NRDC., Inc.
467 U.S. 837 (1984) ..... *passim*

City of Joliet, Ill. v. New West, L.P.,
562 F.3d 830 (7th Cir. 2009) 8-9

Clinton v. City of New York,
524 U.S. 417 (1998) 14, 21, 25

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 7

Exxon Mobil Corp. & Affiliated Cos. v. C.I.R.,
136 T.C. 99 (Tax Ct. 2011) 24

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 13, 18, 19

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555 (1980) 13

Gordon v. Holder,
721 F.3d 638 (D.C. Cir. 2013) 15

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 10

Cited Authorities

Page

Halbig v. Burwell,
758 F.3d 390 (D.C. Cir. 2014) 6-7, 22

Hamdan v. Rumsfeld,
548 U.S. 557 (2006) 25

In re Aiken Cnty,
725 F.3d 255 (D.C. Cir. 2013) 14

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 7, 15, 23

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. 618 (2007) 23-24

Lewis v. City of Chicago, Ill.,
560 U.S. 205 (2010) 8

License Tax Cases,
72 U.S. 462 (1866) 8

Loving v. United States,
517 U.S. 748 (1996) 20, 21

M'Culloch v. Maryland,
17 U.S. 316 (1819) 15-16

Mayo Foundation v. United States,
131 S. Ct. 704 (2011) 17

Cited Authorities

Page

Mistretta v. United States,
488 U.S. 361 (1989) 21, 22

New York v. United States,
505 U.S. 144 (1992) 20

NFIB v. Sebelius,
132 S. Ct. 2566 (2012) 21, 23

Oklahoma ex rel. Pruitt v. Burwell,
---F. Supp. 2d ---, 2014 WL 4854543
(E.D. Okla. Sept. 30, 2014) 16, 18

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 9

Paddock v. United States,
280 F.2d 563 (2d Cir. 1960) 25

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 10

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 20

Pub. Citizen v. NRC,
901 F.2d 147 (D.C. Cir. 1990) 14

Ratzlaf v. United States,
510 U.S. 135 (1994) 7

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Page

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435 F.3d 1238 (10th Cir. 2006) 8, 12

Rodriguez v. United States,
480 U.S. 522 (1987) 10

Ry. Emp. Dep't v. Hanson,
351 U.S. 225 (1956) 25

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 (2014) 23

Shami v. C.I.R.,
741 F.3d 560 (5th Cir. 2014) 16

Skinner v. Mid-Am. Pipeline Co.,
490 U.S. 212 (1989) 17

Sorrells v. United States,
287 U.S. 435 (1932) 8

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978) 8, 20

Terrell v. United States,
564 F.3d 442 (6th Cir. 2009) 14

Union Pac. R.R. Co. v. United States,
99 U.S. 700 (1878) 20

Cited Authorities

Page

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570 F.3d 672 (5th Cir. 2009).....16

United States v. Wells Fargo Bank,
485 U.S. 351 (1988).....16

Util. Air Regulatory Group v. EPA,
134 S. Ct. 2424 18

W. Va. Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991).....7

Yazoo & Miss. Valley R.R. Co. v. Thomas,
132 U.S. 174 (1889) 16

STATUTES AND OTHER AUTHORITIES

U.S. Const. art. I, § 7, cl. 1 16

U.S. Const., art. II, § 3 20

26 U.S.C. § 3121(b)(10) 17

29 U.S.C. § 251(a).....23

42 U.S.C. § 18041(c).....19

H.R. Res. 1225, 111th Cong. (Mar. 25, 2010) 12

Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009) 24

Cited Authorities

Page

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Page

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae share a strong interest in this case given its significant implications for each organization's mission.

The Pacific Research Institute ("PRI") is a non-profit non-partisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of Americans. PRI demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action in providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include publications, public events media commentary, invited legislative testimony, filing *amicus* briefs with courts, and community outreach.

The Individual Rights Foundation (IRF) was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file *amicus curiae* briefs in cases involving fundamental constitutional issues. The IRF opposes attempts to undermine freedom of speech and equality of

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

rights, and it combats overreaching governmental activity that impairs individual rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

SUMMARY OF THE ARGUMENT

Despite the political prominence of this litigation, it is a simple case that should turn on a fundamental constitutional principle: neither a federal court nor an executive agency can ignore or override a law's plain meaning—period. There can be no meaningful dispute that the text of the Affordable Care Act ("ACA") makes tax credits available only to those purchasing insurance on state Exchanges. Brief for Petitioners ("Pet. Br.") 18-30. Yet by relying on legislative purpose and invoking *Chevron* deference, the Fourth Circuit upheld an Internal Revenue Service ("IRS") regulation deeming federal Exchanges to be state Exchanges and thus making premium tax credits available to purchasers on federal Exchanges. Petition Appendix ("Pet. App.") 1a-41a. By

upholding the IRS Rule, the Fourth Circuit failed to fulfill its responsibility under Article III.

The Fourth Circuit should have rejected the IRS's appeal to broad congressional purposes. By elevating its own perception of Congress's broad vision over the law's text, the Fourth Circuit ignored the cardinal principle that legislative purpose must be effected by the words Congress uses, not the words a court believes Congress might have or should have used. Article III does not empower courts to divine Congress's overarching objective and then reverse-engineer a version of the law that best achieves it. Quite the opposite, the judicial task is to discern the ordinary meaning of the words Congress uses and enforce them. Thus, even accepting as correct the Fourth Circuit's questionable assessment that Congress wanted to extend tax subsidies to those purchasing insurance through federal Exchanges, there is no basis for deviating from Congress's expressed will. Unenacted legislative intentions are not the supreme law of the land under Article IV of the Constitution.

Moreover, a unified legislative purpose is almost always a myth. Legislation is the product of negotiation and compromise in which lawmakers may sacrifice one interest to achieve another. In the main, a bill successfully runs the legislative gauntlet not because Congress has a unity of purpose—but because it reconciles a multiplicity of purposes, some of which may be incompatible. The notion that *every* Representative and *every* Senator voting in favor of a bill did so for the *same* reason paints an unrealistic picture of the legislative process. The process leading to the ACA's passage illustrates the point. This behemoth of a law—over 2,400 pages in all—resulted from

ad hoc procedures, convenient alliances, special deals to secure holdout votes, admissions by key legislators that they never read it, and a chaotic race to the finish line prompted by the surprising outcome of a special election in Massachusetts. If there were ever a case in which a court should refrain from divining a unified congressional purpose, this is it.

Attempting to uncover a single legislative purpose in derogation of the law's plain meaning is not only beyond judicial competence, it invades Congress's constitutional province. If the ACA needs to be amended or rewritten to achieve the legislature's intention in passing it in the first place, that is Congress's job. That would be true even if the ACA's limitation on subsidies were nothing more than a drafting error. If the statutory provision at issue was the product of inadvertence or oversight, Congress must—and indeed can—fix the problem itself. Corrective technical legislation, particularly in the complex field of the Internal Revenue Code, is routinely enacted to resolve problems of correlating legislative intent and statutory language. Pursuit of a technical correction, rather than rewriting the statute to suit the Executive's policy preference, was the proper action for the IRS to take to broaden subsidy entitlement. Courts are required by Article III to ensure that federal agencies do not end-run the legislative process.

The Fourth Circuit's reliance on *Chevron* deference is equally misplaced. *Chevron* does not permit an executive agency to rewrite statutory law to advance what it perceives, rightly or wrongly, to be the broad purpose of legislation. When the statute's text is unambiguous, as it is here, there is no place for agency deference. Judicial

acquiescence to an agency regulation rewriting federal law is not *Chevron* deference.

But even if the IRS were able to claim tenuous ambiguity by cobbling together a miscellany of legislative provisions, as the Fourth Circuit did, substituting deference for the better textual construction is appropriate only if Congress intended for the agency to fill statutory gaps. There is no indication in the ACA that Congress delegated to the IRS the power to determine whether billions of federal subsidy dollars annually should be dispersed to those purchasing health coverage on federal Exchanges. The IRS cannot use an ambiguous statute to impose a tax or create a tax credit that Congress did not specifically authorize.

At base, the Constitution separates the branches of government in anticipation of situations like this one. It is perhaps understandable that the IRS and the Fourth Circuit surrendered to temptation and rewrote the ACA in order to aid those taxpayers whose ability to afford health coverage might be compromised by the unavailability of credits on federal Exchanges and the failure of states to establish their own Exchanges. But the Framers understood that such concerns must be redressed through democratic means, however imperfect and inefficient they sometimes may be. The Fourth Circuit ignored the fundamental principle that expediency cannot trump first principles. This Court should not do the same. It should remain true to this fundamental bulwark of our constitutional system and return the ACA subsidy issue to the political system where it belongs.

ARGUMENT

I. The Fourth Circuit Failed To Fulfill Its Article III Responsibility To Enforce The Text Of The Affordable Care Act As Written.

There can be no legitimate dispute that the text of the ACA forecloses purchasers on federal Exchanges from obtaining premium tax credits. This is not a close question. *See* Pet. Br. 18-30. The Fourth Circuit, nevertheless, upheld the IRS Rule in contravention of Section 36B's plain meaning. The court's purported rationale was a perceived variance between the ACA's text and Congress's overall purpose in passing the statute. To the court, then, the key issue was not the statute's text, but rather what "Congress intended" in passing the ACA. Pet. App. 63a. That mode of analysis is seriously flawed for several reasons.

As an initial matter, the assertion that the ACA's *only* goal was to expand health coverage at all costs is overly simplistic and wrong. There is ample evidence that Congress also was concerned with creating incentives for states to establish Exchanges and making states politically accountable. *See* Pet. Br. 1-5, 32-43. For example, the ACA's own Medicaid expansion provisions expressly rely on financial incentives to induce states to expand their participation in that program on pain of having their disadvantaged citizens bear the consequences if they refuse to do so. The assertion that the singular purpose of the federal Exchanges is to provide health care coverage to those individuals eligible for tax subsidies is similarly mistaken. "Federal Exchanges might not have qualified individuals, but they would still have customers—namely, individuals who are not 'qualified individuals.'" *Halbig v.*

Burwell, 758 F.3d 390, 405 398 (D.C. Cir. 2014), *reh'g en banc granted, judgment vacated*, No. 14–5018, 2014 WL 4627181 (D.C. Cir. 2014). They would secure the savings that the ACA envisions as resulting from increased competition at centralized, transparent shopping venues.

Even assuming arguendo that the Fourth Circuit correctly identified Congress's primary purpose in passing the ACA, no interpretative canon allows a court to elevate legislative purpose over plain meaning. Specifically, the "preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRocs Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Courts "do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Even if the ACA's text conflicts with Congress's goal of universal coverage, it is irrelevant. "In such a contest, the text must prevail." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259 n.6 (2009).

Even if the statutory text were a pure drafting error—producing a law precisely the *opposite* of what Congress intended—the Court *still* must enforce the law as written. This Court cannot "soften the import of Congress's chosen words even if [it] believe[s] the words lead to a harsh outcome." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). "It is beyond [this Court's] province to rescue Congress from its drafting errors, and to provide for what [it] might think is the preferred result." *Id.* at 542; *see W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) ("The facile attribution of congressional 'forgetfulness' cannot justify [judicial] usurpation.").

If it was an error in the ACA's drafting that excluded individuals purchasing insurance through federal Exchanges from eligibility for tax credits and, "that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 217 (2010). "Judicial nullification of statutes ... has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes." *Sorrells v. United States*, 287 U.S. 435, 450 (1932).

Favoring the ACA's text over an allegedly conflicting legislative purpose is not an arbitrary judicial policy—it follows directly from the judiciary's "limited role in [the] tripartite government." *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006). "While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Federal courts "cannot amend or modify any legislative acts" or judge "questions as expedient or inexpedient, as politic or impolitic." *License Tax Cases*, 72 U.S. 462, 469 (1866).

Rather, the judiciary must respect the compromises wrought during the legislative process, and it must resist the urge to rewrite "a more coherent, more rational statute." *Robbins*, 435 F.3d at 1243. When courts rewrite statutes to better effectuate Congress's overall purpose, they "become effective lawmakers, bypassing the give-and-take of the legislative process." *City of Joliet, Ill. v. New West, L.P.*, 562 F.3d 830, 837 (7th Cir.

2009). By glossing over hidden legislative compromises, judicial adjustments invade Congress's domain. *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 43 (1895).

Courts apply laws as written—not legislative intentions—because laws are what command legitimacy. "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge v. Williams*, 44 U.S. 9, 24 (1845). In other words, "the law *is* what the law *says*." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring). Therefore, even if the ACA's singular purpose were discernible through the foggy lens of legislative history, courts do not sit to vindicate purpose in derogation of the words chosen by Congress. "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998).

The reality, of course, is that a court's search for a unitary legislative intent will almost always end in disappointment. "Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a mind; it 'intends' only that the text be adopted, and statutory texts usually are compromises that match no one's first preference." Frank H. Easterbrook, foreword to *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia & Bryan A. Garner (1st ed. 2012) (emphasis in original). Individual legislators often have sharply different views on the goals and scope of their enactments, so "the words by which the legislature undertook to give expression to its wishes"

offer the most "persuasive evidence" of a law's purpose. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

It should come as no surprise that the final product may lack an internally consistent purpose as legislation often passes through compromise and negotiation among competing interests. "[L]egislative preferences do not pass unfiltered into legislation; they are distilled through a carefully designed process that requires legislation to clear several distinct institutions, numerous veto gates, the threat of a Senate filibuster, and countless other procedural devices." John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2390 (2003). Results that might seem ill-fitting as an abstract matter "may be perfectly rational from a legislative process perspective." *Id.* at 2431. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990).

Attempting to divine a singular legislative purpose from the legislative process is thus hazardous even as a last resort. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). But to use the results of this kind of vague judicial inquiry into legislative motive as the interpretative touchstone when the text of the statute is

unambiguous, as is the situation here, is constitutionally impermissible.

The ACA's legislative history is a case study in why the search for a unified legislative purpose is treacherous. To state the obvious, the ACA was hardly the result of a deliberative, harmonious process in which Congress acted with clarity of purpose. Indeed, it appears that the process was orchestrated in order to hide the ACA's true aims from Members of Congress and the public. *See* David Nather, *Will Jonathan Gruber Topple Obamacare?*, Politico Magazine, Dec. 7, 2014 (quoting Jonathan Gruber, one of the architects of the legislation, as stating that "[t]his bill was written in a tortured way to make sure CBO did not score the mandate as taxes. If CBO scored the mandate as taxes, the bill dies.... Lack of transparency is a huge political advantage.... Call it the stupidity of the American voter or whatever, but basically that was really, really critical to getting the thing to pass.").

Further, "debate over health care was contentious from the legislation's inception, and enacting it required a variety of ad hoc procedures." John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 Law Libr. J. 131, 133 (2013). "[F]ragile truce[s]" and "delaying tactic[s]" plagued the process as the ACA's proponents scrambled to insulate themselves from filibuster. *Id.* at 156. One key Senator's vote was secured by adding an amendment to boost his state's Medicaid reimbursement rates, and another's was reportedly obtained in exchange for similar inducements. *See* Vincent L. Frakes, *Partisanship and (Un)Compromise: A Study of the Patient Protection and Affordable Care Act*, 49 Harv. J. on Legis. 135, 138-39 (2012).

Amendments reflected more unusual bargains as well. "Opposition to funding the proposal through taxes on elective cosmetic surgery," for instance, "led to a change that taxed 'indoor tanning services' instead." Cannan, *supra*, at 156-57. And after Scott Brown won a special election to fill Senator Ted Kennedy's seat, the bill stood on a knife's edge, as the filibuster-proof majority in the Senate unexpectedly collapsed. The bill survived only because a slim House majority passed it *in toto*—and separately pushed through amendments by way of a short-fuse "reconciliation" bill that was immune from filibuster. H.R. Res. 1225, 111th Cong. (Mar. 25, 2010). More than any other law in recent memory, "[a] change in any individual provision [in the ACA] could have unraveled the whole." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002). The resulting 2,400-plus-page reformation of the American health care system was therefore a mass of compromises.

Given this "rough and tumble of the legislative process," *Robbins*, 435 F.3d at 1243, it would be folly to rely on unified congressional purpose as an interpretative foundation, *Barnhart*, 534 U.S. at 461 (refusing to "judge or second-guess" the legislative process). Legislative intent is, on its best day, a secondary interpretative tool courts will sometimes employ when the primary interpretative means fail to yield a clear answer. But that is not the case here. The ACA's text is clear. It just does not embody the Fourth Circuit's and the IRS's perception of the singular purpose of what Congress was trying to achieve in this legislation. That kind of reverse-engineered interpretative process is inappropriate, especially given the ACA's chaotic path to law. In a case like this, the statute's text is the only sure footing. It must be enforced as written.

II. Neither The IRS Nor The Courts Have The Authority To Usurp Congress's Lawmaking Power By Making Tax Credits Available To Purchasers On Federal Exchanges.

The constitutional duty of the Executive Branch and the courts to faithfully interpret federal law is not diminished because this case involves an administrative regulation. *See Chevron U.S.A. Inc. v. NRDC., Inc.* 467 U.S. 837, 842-43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Under *Chevron*, then, if "Congress has directly spoken to the precise question at issue ... the inquiry is at an end.... But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (internal citations and quotations omitted).

As the Court has explained many times, "deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Id.* at 159. An agency's reasonable construction is entitled to judicial respect when, by leaving a statutory gap, Congress has implicitly chosen to delegate *its* "lawmaking power" to the federal agency. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). Respect for the agency's regulatory choice honors Congress's delegation. By the same token, however, "[w]hen the statute is unambiguous, there has been no delegation to the agency to interpret the statute and therefore the agency's interpretation deserves no

consideration at all, much less deference." *Terrell v. United States*, 564 F.3d 442, 450 (6th Cir. 2009). Unlike when Congress leaves a gap in the law, upholding a regulation that varies from the statute's unambiguous terms usurps Congress's choice *not* to delegate its lawmaking power to the agency.

Because Section 36B is not ambiguous, allowing the IRS to ignore the ACA's plain meaning would deal a double blow to our tripartite system. First, it would allow the Executive to ignore the will of Congress—expressed in the text—and substitute its preferred outcome for the one provided for by law. The Constitution does not give the executive branch "the unilateral power to change the text of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 447 (1998). "[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress." *In re Aiken Cnty*, 725 F.3d 255, 260 (D.C. Cir. 2013). The IRS may disagree with Congress's choice not to afford tax subsidies to those purchasing insurance through federal Exchanges, but it was Congress's choice to make. "When Congress gives an agency its marching orders, the agency must obey all of them, not merely some." *Pub. Citizen v. NRC*, 901 F.2d 147, 156 (D.C. Cir. 1990).

Second, the improper invocation of administrative deference would allow the judiciary to use it as an excuse to impose its own sense of what is best and thus arrogate to the court legislative power the Constitution assigned to Congress. That is the very problem *Chevron* was designed to solve. "Before *Chevron*, each of hundreds of federal judges had substantial policymaking power." Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2233 (1997). *Chevron* ensures that

policymaking resides in the political branches and that the power either to make the legislative choice itself or delegate that responsibility to an agency remains "under the control of Congress." Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 Nw. U. L. Rev. 551, 555-56 (2012). When there has been a delegation, *Chevron* thus keeps judges "from substituting their own interstitial lawmaking for that of an agency." *City of Arlington, Tex.*, 133 S. Ct. at 1873. And when there has not been a delegation from Congress, as is the case here, the court's "sole function ... is to enforce [the statute] according to its terms." *Lamie*, 540 U.S. at 534. The *Chevron* question is resolvable on this ground alone.

But even if the statute were ambiguous, recognizing an implicit delegation is especially inappropriate here given that the IRS Rule involves Congress's taxing power. Close examination of the power of taxation reveals there is no basis for concluding that the IRS has the authority to impose taxes or grant tax credits based on an ambiguous statute. The taxing power has a unique place in our history. King George's unjust imposition of taxes on the Colonies was one of the chief charges against him: "He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation .... For imposing taxes on us without our Consent." The Declaration of Independence para. 15 (1776); *Gordon v. Holder*, 721 F.3d 638, 649 (D.C. Cir. 2013) ("The demand that taxation regimes possess democratic legitimacy finds deep roots in the founding of our republic.").

The Framers knew all too well that "the power to tax involves the power to destroy." *M'Culloch v. Maryland*,

17 U.S. 316, 431 (1819). That is why all tax legislation originates in the House of Representatives. U.S. Const. art. I, § 7, cl. 1. Members of the House "were chosen by the people, and supposed to be the best acquainted with their interest and ability," 1 Annals of Cong. 65 (1789) (Joseph Gales ed., 1834), and, therefore, most likely to protect the federal treasury against profligate spending and limit the Executive's ability to tax arbitrarily, The Federalist 66, at 401-02 (A. Hamilton) (Jacob E. Cooke ed. 1961). As a consequence, judicial review of tax laws has been framed by the understanding that the "taxing power is one of the most jealously guarded prerogatives exercised by Congress." *Air Power, Inc. v. United States*, 741 F.2d 53, 56 (4th Cir. 1984).

"[E]xemptions from taxation" therefore "are not to be implied; they must be unambiguously proved." *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). That holds true for tax credits, which "are only allowed as clearly provided for by statute, and are narrowly construed." *United States v. McFerrin*, 570 F.3d 672, 675 (5th Cir. 2009). "On this particular 'precise question' ... case law does not provide 'wiggle room' for finding ambiguity. This is because tax credits must be expressed in 'clear and unambiguous language.'" *Oklahoma ex rel. Pruitt v. Burwell*, ---F. Supp. 2d ---, 2014 WL 4854543, at *7 (E.D. Okla. Sept. 30, 2014) (quoting *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 186 (1889)); *see also Shami v. C.I.R.*, 741 F.3d 560, 567 (5th Cir. 2014) ("Tax credits are a matter of legislative grace, are only allowed as clearly provided for by statute, and are narrowly construed.").[2]

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2. *Chevron* deference likewise is inapplicable here because this IRS regulation involves Congress's exercise of its Appropriation power. *See* Pet. Br. 54-55.

Hence, the IRS's interpretation of Section 36B—a tax credit—is not entitled to deference even assuming statutory ambiguity. Because Congress did not "indicate clearly its intention to delegate to the Executive the discretionary authority" to grant these tax credits, *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989), there is no basis for deferring to the IRS's interpretation of Section 36B. Congress may not "delegate power to determine whether taxes should be imposed.... [This is] the difference between delegating the underlying power to set basic policy ... and the authority to exercise discretion in administering the policy." *The Constitution of the United States of America: Analysis and Interpretation*, Congressional Research Service, Sen. No. 112-9, at 93 (2013).

Mayo Foundation v. United States, 131 S. Ct. 704 (2011), illustrates the difference. Unlike here, the issue in *Mayo* was not whether Congress had authorized a tax-exemption regime; no one disputed that Congress had exempted from certain taxes "a student who is enrolled and regularly attending classes at such school, college, or university." *Id.* at 709 (quoting 26 U.S.C. § 3121(b)(10)). The interpretive issue was whether a medical resident qualified as "a student" for purposes of the statute. *Id.* at 708. In finding that the IRS was entitled to *Chevron* deference in making that narrow determination, the Court merely held that the IRS—like other administrative agencies—had discretionary authority to promulgate a rule to define what made someone a "student" within the meaning of the statute because Congress could not be expected to determine the term's applicability to every circumstance that might arise. But nothing in *Mayo* held or implied that such deference altered the longstanding proposition that

the IRS cannot rely on an ambiguous statute to impose a tax or create a nationwide credit. *See Pruitt*, 2014 WL 4854543 at *7 n.20.

In any event, the IRS's claim of deference fails at the outset because it is simply unthinkable that Congress would have allowed the IRS to decide for itself whether to disperse billions of dollars in tax credits annually. "*Chevron* deference ... rests on a recognition that Congress has delegated to an agency the interpretative authority to implement a particular provision or answer a particular question." *City of Arlington, Tex.*, 133 S. Ct. at 1882. The Court has always been "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133; *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") (quoting *Brown & Williamson*, 529 U.S. at 160).

It defies common sense to think Congress buried in Section 36B a delegation of unfettered authority for the IRS to decide whether to spend billions of taxpayer dollars annually. Thus, even if such legislation were theoretically eligible for *Chevron* deference, it is not credible to presume that Congress surrendered *this* massive tax spending authority *sub silentio*.

The Fourth Circuit hypothesized that "Congress *perhaps* might not have wanted to resolve a politically sensitive issue" or "it *might* have intended to see how large a role the states were willing to adopt on their own before having the agency respond with rules ...." Pet. App. 27a

n.4 (emphasis added). But neither theory passes muster. As noted above, the issue's political sensitivity cuts against presuming a delegation here—not in favor of it under *Brown & Williamson* and its progeny.

Furthermore, the Fourth Circuit's speculation that Congress took a wait-and-see approach concerning the availability of tax credits on federal Exchanges is misplaced. The ACA requires the Department of Health and Human Services to create federal Exchanges in the event a state fails to establish an Exchange. 42 U.S.C. § 18041(c). There was thus no reason for Congress to wait and see what the states would do before deciding whether to include what the defenders of the IRS Rule have described as a "contingency provision." Pet. App. 34a (Davis, J., concurring). That is, Congress either precluded purchasers on federal Exchanges from receiving tax credits (as Petitioners correctly argue) or it did not (as the IRS incorrectly argues). But it is quite implausible to presume that Congress delayed addressing how to grapple with a known multi-billion-dollar contingency until *after* it arose. The Court cannot presume delegation of an issue of such political and economic significance based on such shaky speculation. There was no delegation here.

III. Fundamental Separation Of Powers Principles Require The Court To Return The Issue Of Tax Credit Availability On Federal Exchanges To The Political Process.

The Court must reverse the Fourth Circuit's judgment because the ACA's text commands that result. But far more is at stake here than a run-of-the-mill statutory construction dispute. To put it bluntly, the IRS has

brazenly rewritten a federal law because the Executive believes that adhering to the ACA as passed by Congress will frustrate the health insurance program.

The "safety of our institutions depends in no small degree on strict observance" of separation of powers. *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878). "[T]he lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). The Executive may veto legislation he deems unwise subject to congressional override. But once a bill becomes law, he must "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. In short, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587; *Tenn. Valley Auth.*, 437 U.S. at 194. It is difficult to recall a more stark violation of this bedrock constitutional rule than the IRS Rule.

This may "appear 'formalistic' ... to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity." *New York v. United States*, 505 U.S. 144, 187 (1992). Indeed, this is not the first or last time the Executive will claim honorable intentions as a justification for seizing legislative powers. That is the central point of having a Constitution with "high walls and clear distinctions" as "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). "The Constitution ... divides power ... among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

Importantly, the Court does not act as steward of these structural principles to advance any one branch's parochial interests nor for reasons of form alone. To be sure, "disregard [of] structural legitimacy is wrong in itself—but since structure has purpose, the disregard also has adverse practical consequences." *Mistretta v. United States*, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting). The Court acts because, as the Framers learned firsthand, "[c]oncentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); *see also Loving*, 517 U.S. at 756; Sir William Blackstone, 1 Commentaries on the Laws of England, 146 (1783); The Federalist No. 47 (J. Madison) (Jacob E. Cooke ed. 1961).

This dispute vindicates the Framers' concerns. The IRS's usurpation of legislative power comes not only at a steep price to the federal treasury, but to liberty. As a consequence of the IRS's decision to rewrite Section 1321, millions of Americans must pay a tax penalty simply for choosing "not to purchase health insurance." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2588 (2012) (Roberts, C.J.); *see also* Brief in Opposition 5. The IRS Rule also exposes most employers in states that do not establish an Exchange to a tax penalty for failing to offer qualified health coverage to full-time employees. *See* Pet. Br. 8-9. Only Congress may impose such tax penalties under the Constitution.

This does not mean that standing up for structural principles is easy. The Fourth Circuit's decision appears to have been driven by the "unforeseen and undesirable consequences" of enforcing the law as written. Pet. App. 31a; Pet. App. 40a (Davis, J., concurring) (claiming that "Appellants' approach would effectively destroy the

statute"); *Halbig*, 758 F.3d at 412 (Edwards, J., dissenting) ("It is inconceivable that Congress intended to give States the power to cause the ACA to 'crumble.'"). The court simply would not "help to deny to millions of Americans desperately-needed health insurance" by striking down the IRS Rule. App. 40a (Davis, J., concurring); *Halbig*, 758 F.3d at 412 (Edwards, J., dissenting) ("This case is about Appellants' not-so-veiled attempt to gut the [ACA].").

But this is when structure matters most. Adherence to foundational principles cannot turn on antipathy for Petitioners' purported motives or judicial sympathy for those who would benefit from rewriting the ACA. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407. However tempting it might be for the courts to permit the IRS to expand health care coverage beyond what Congress authorized, the long-term institutional damage would be immeasurable. "The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage v. United States*, 124 S. Ct. 881, 892 (2014).

In any event, like Mark Twain's death, the report of the ACA's demise at the hands of petitioners has been greatly exaggerated. The IRS Rule made state refusals to establish Exchanges politically costless. But states will have a much more difficult choice to make if their refusal denies their residents tax credits that help make health insurance coverage more affordable. "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds" and states are free to reject the bargain.

NFIB, 132 S. Ct. at 2603. "The States are separate and independent sovereigns. Sometimes they have to act like it." *Id.* The IRS Rule obliterates that separate responsibility.

Further, "if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." *Lamie*, 540 U.S. at 542. Congress has a long history of doing just that. In the 1940s, for example, the Supreme Court broadly interpreted the undefined terms "work" and "workweek" in the Fair Labor Standards Act. The Court concluded that these terms "encompassed time spent 'pursu[ing] certain preliminary activities after arriving ... , such as putting on aprons and overalls [and] removing shirts.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946)). Congress responded through legislation to ensure that the law continued to operate consistent with the legislature's purpose. The Portal-to-Portal Act of 1947 legislatively rectified the Supreme Court's "disregard of long-established customs, practices, and contracts between employers and employees." *Id.* (quoting 61 Stat. 84 (1947), as amended, 29 U.S.C. § 251(a)).

More recently, in 2009, the Lilly Ledbetter Fair Pay Act was enacted to supersede a judicial interpretation of the charging period set forth in Title VII of the Civil Rights Act of 1964. Noting "the legislative compromises that preceded the enactment of Title VII," the Supreme Court held that Title VII's charging period was triggered on the date an employer made its initial discriminatory wage decision, not on the date of the most recent paycheck issued. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S.

618, 630-31 (2007). Congress viewed this interpretation as "at odds with the robust application of the civil rights laws that Congress intended," Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009), and promptly amended Title VII to ensure that the limitations period for equal-pay claims renews with each paycheck affected by discriminatory action, *id.* § 3.

This case is no different. Nothing prevents Congress from amending the ACA to provide for tax credits for purchasers in both state and federal Exchanges if that is what it intended in the first place. As always, Congress is free to "turn[] to technical corrections" when "it wishes to clarify existing law." *Exxon Mobil Corp. & Affiliated Cos. v. C.I.R.*, 136 T.C. 99, 119 (Tax Ct. 2011). Congress "must routinely correct for technical errors and sometimes amend new provisions after enactment to harmonize old and new laws." Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 Va. Tax Rev. 645, 670 (2003); *see, e.g.*, Tax Technical Corrections Act of 2007, Pub. L. No. 110-172, 121 Stat. 2473 (2007); Tax Technical Corrections Act of 2005, Pub. L. No. 109-135, 119 Stat. 2610 (2005); Tax Technical Corrections Act of 1998, Pub. L. No. 105-206, 112 Stat. 790 (1998); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988); Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365 (1983).

If Congress wants to correct any errors it can do so immediately. "Existing procedures such as suspension of the rules or proceeding under unanimous consent" give Congress the tools to fix legislation "on an expedited schedule." John C. Nagle, *Corrections Day*, 43 UCLA L. Rev. 1267, 1281 (1996). "It should not be hard to secure legislative correction of [an] alleged judicial error if the

courts have in fact misread the Congressional purpose and the consequences to the revenue are as serious as the government says." *Paddock v. United States*, 280 F.2d 563, 568 (2d Cir. 1960) (Friendly, J.).

That the ACA is politically controversial does not alter the analysis. *See, e.g. Barnhart*, 534 U.S. at 438; Scalia & Garner, *supra*, at 1615. Nor does the political likelihood of correction bear on the proper result. "The Framers of the Constitution could not command statesmanship," and "[f]ailure of political will does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449, 452-53 (Kennedy, J., concurring). Regardless of legislative inaction, the courts "are not at liberty to rewrite [laws] to reflect a meaning [they] deem more desirable." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring). Congress—not the courts—has been entrusted with "the final say on policy issues." *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 234 (1956).

In the end, this just is not a close case. Separation of powers principles require the Court to draw a clear line. But "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," and "judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means." *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring). This Court should too.

CONCLUSION

Amici curiae respectfully ask that the Court reverse the judgment below.

Respectfully submitted,

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